

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 404 OF 2013

M/s. Macleods Pharmaceuticals Limited,
A Company incorporated under the
Companies Act, 1956, having its
registered office at : 304, Atlanta Arcade,
Marol Church Road, Andheri (East),
Mumbai -400059

... Plaintiff

Versus

1. Avin Pharma Ukraine Limited,
KRINON 16 LIMASSOL, Cyprus, 3110
And
Avinatural Cosmetics Limited,
P.O. Box 5708, 3311 Limassol

2. Private Enterprise MKL Avin Ukraine,
KRINON 16 LIMASSOL, Cyprus, 3110
And
Avinatural Cosmetics Limited,
P.O. Box 5708, 3311 Limassol

... Defendants

Mr. M. Behl i/b. Sonal Doshi and Company for the Plaintiff.
None for the Defendants.

CORAM : S.J. KATHAWALLA, J.
DATED : 31ST JULY, 2015

ORAL JUDGMENT :

1. The above Suit is filed by the Plaintiff - M/s. Macleods Pharmaceuticals Limited against Defendant No. 1 – Avin Pharma Ukraine Limited and Defendant No. 2 Private Enterprise MKL Avin Ukraine for an order and decree directing the Defendants to remit the Plaintiff the entire outstanding sale proceeds received from the sale of the finished pharmaceutical products consigned by the Plaintiff to the

Defendants and for interest thereon as and by way of damages.

2. The Writ of Summons has been served on the Defendants and an Affidavit of Service dated 18th February, 2015 is on record. Since the Defendants failed to file their Written statements, by an order dated 17th June, 2015 the Suit was directed to be listed for ex-parte decree. Accordingly, the Suit today is listed for final hearing for ex-parte decree. The Plaintiff has filed an Affidavit of Mr. Vinayak Shiroadkar (PW-1) in lieu of Examination in Chief dated 27th July, 2015 and a Compilation of Documents.

3. The PW-1 has deposed in his Affidavit in lieu of Examination in Chief as follows :

3.1. That PW-1 is the Chief Financial Officer (CFO) of the Plaintiff Company and his responsibilities include *inter alia* handling accounts, finance, taxation, compliance and statutory audits etc.

3.2. That the deposition of PW-1 is based on his personal knowledge.

3.3. That PW-1 is authorized to depose on behalf of the Plaintiff in the above Suit pursuant to a resolution passed by the Board of Directors at its meeting held on 13th July, 2015. PW-1 has tendered a certified copy of the said resolution. The same is taken on record and marked Exhibit-P-1.

3.4. That on 27th September, 2005 the Plaintiff entered into an Agreement with Defendant No. 1, whereby the Plaintiff appointed Defendant No. 1 as its Commission Agent in Ukraine to sell its various products more particularly enumerated in Annexure-A to the said Agreement. The commission scale was defined in Annexure-B to the Agreement. The Agreement was to come into force on 27th

September, 2005 and remain in force for a period of three years from 27th September, 2005. The Agreement spelt out the mutual rights and obligations of the respective parties. Mr. Girdharilal Bawri, Director of the Plaintiff and Mr. Pankaj Vidyarthki on behalf of Defendant No. 1 have signed the Agreement. PW-1 has deposed that he identifies the signatures of Mr. Bawri and Mr. Vidyarthki thereon. PW-1 has tendered the original Agreement dated 27th September, 2005. The said agreement is taken on record and marked Exhibit-P-2.

3.5. That on the same date, the Plaintiff and Defendant No. 1 also entered into a Confidentiality Agreement, whereby Defendant No. 1 agreed not to disclose any matter constituting the confidential information of the Plaintiff. Mr. Girdharilal Bawri, Director of the Plaintiff and Mr. Pankaj Vidyarthki on behalf of Defendant No. 1 have signed the Agreement. The said agreement is witnessed by Mr.S. Siraram and Mr. Manish Todi. PW-1 has deposed that he is acquainted with the signatures of Mr. Bawri, Mr. Vidyarthki, Mr.S. Siraram and Mr. Manish Todi and identifies the same. PW-1 has tendered the original Confidentiality Agreement dated 27th September, 2005. The same is taken on record and marked Exhibit-P-3.

3.6. That, on 1st November, 2007 an amendment was made to the aforementioned Agreement dated 27th September, 2005 (Exhibit-P-2), whereby the commission structure payable to Defendant No. 1 was revised and the minimum monthly commission payable to Defendant No. 1 was increased from 1200 USD to 2750 USD per month. Mr. Girdharilal Bawri, Director of the Plaintiff and Mr. Pankaj Vidyarthki on behalf of Defendant No. 1 have signed the Amendment Agreement. PW-1 has deposed that he is acquainted with the signatures of Mr. Bawri

and Mr. Vidyarthki and identifies the same. Since the original Agreement is misplaced, PW-1 has tendered a copy of the said Amendment Agreement. The same is taken on record and marked Exhibit-P-4.

3.7. That on 11th November, 2011 the Plaintiff and the Defendants entered into a Memorandum of Understanding (MOU). By this Agreement, the parties agreed to validate and renew the Agreement dated 27th September, 2005 for a further period of one year and also agreed to make certain amendments thereto. One of the amendment was to Clause 7 (h). In view of the said amendment, the entire collection and outstanding was required to be remitted to the Principal i.e. the Plaintiff herein upon closure or termination of the Agreement. The said Agreement was signed by Dr. R. Agarwal on behalf of the Plaintiff and Mr. Pankaj Vidyarthki on behalf of Defendant No. 1. PW-1 has deposed that he is acquainted with the signatures of Dr. Agarwal and Mr. Vidyarthki and identifies the same. PW-1 has tendered the original MOU dated 11th November, 2011. The same is taken on record and marked Exhibit-P-5.

3.8. That as per the terms and conditions of the Agreement dated 27th September, 2005 (Exhibit-P-2), the Agreement dated 1st November, 2007 (Exhibit-P-4) and the Memorandum of Understanding dated 11th November, 2011 (Exhibit-P-5), the Plaintiff consigned finished pharmaceutical products from India to the Defendant and or its group companies in Ukraine. These consignments were shipped on CIF i.e. Cost Insurance and Freight basis. The Plaintiff consigned the goods aggregating to a value of 1,42,29,028.69 USD. The Defendants in turn remitted an amount of 1,33,41,197.63 USD on account leaving outstanding an

amount of 8,87,831.06 USD. This outstanding was due against the following invoices :

Invoice No. 4690 dated 26th September, 2011

Invoice No. 10324 dated 26th September, 2011

Invoice Nos. 10333 & 10396 dated 14th October, 2011

Invoice No. 10334 dated 26th September, 2011

Invoice No. 10335 dated 30th September, 2011

Invoice No. 10336 dated 26th September, 2011

Invoice No. 10354 dated 30th September, 2011

Invoice No. 10396 dated 14th October, 2011

Invoice Nos. 10439 & 10443 dated 25th October, 2011

Invoice Nos. 10458, 10467 & 10470 dated 31st October, 2011

PW-1 has tendered the respective office copies of the invoices maintained by the Plaintiff along with their companion documents being the office copies of packing list, airway bill, insurance cover note, the exchange control copy of the shipping bill issued by the Commissioner of Customs. These invoices are signed by Mr. Yogesh Jadhav who was the Authorized Signatory of the Plaintiff at the relevant time. PW-1 has deposed that he is acquainted with the signature of Mr. Jadhav and identifies the same. PW-1 has tendered the copies of invoices along with their companion documents. The same are taken on record and marked Exhibit-P-6 collectively.

3.9. That as per the terms of the MOU dated 11th November, 2011, upon the closure of the Agreement the Defendants were to remit the entire collection and outstanding to the Plaintiff. The Agreement came to an end by efflux of time on 25th

September, 2012, at which time, there was a debit outstanding of 8,87,831.06 USD in the Defendants ledger account maintained by the Plaintiff. PW-1 has verified the entries in this ledger account and found the same to be true and correct. The ledger account of the Defendant as maintained by the Plaintiff is a computer generated output printed out from computers located in the accounts department of the Plaintiff. At all material times during the period 2005 to 2012, these computers were only used by Mr. Binod Jha and Mr. Suresh Nivesh Waliya who were all members of the accounts team of the Plaintiff and who are authorized to use these computers. All of the aforementioned people are answerable to PW-1 within the hierarchy of the Plaintiff. Therefore, at all times during the period 2005 to 2012, they have operated the computers as per his instructions. During the aforementioned period, the accounts of the Plaintiff, which were fed into the computer of the Plaintiff in the ordinary course of its business activities, were stored and processed properly by the aforementioned persons. Throughout the material part of the aforementioned period, the aforementioned computers were operated properly and therefore the accuracy of the computer generated output has not been affected in any way whatsoever. The information contained in the aforesaid computers output is the information fed into the computers by PW-1 and the aforementioned employees during the aforementioned period during the ordinary course of the business of the Plaintiff. PW-1 has tendered the copies of ledger account of the Plaintiff. The same are taken on record and marked Exhibit-P-7 collectively.

3.10. That the banker of the Plaintiff has issued a certificate under the provisions of Bankers Book Evidence Act endorsing the numerous remittances made

by the Defendants to the Plaintiff in all aggregating to 1,33,41,197.63 USD. This as aforesaid is against a total aggregate supply of finished pharmaceutical goods worth 1,42,29,028.69 USD. PW-1 has tendered the original certificate. The same is taken on record and marked Exhibit-P-8.

3.11. That since the Defendants defaulted in remitting the balance outstanding aggregating to 8,87,831.06 USD, the Plaintiff instructed their Advocates in Ukraine to address a demand notice upon the Defendants and accordingly a letter dated 27th June, 2012 was addressed by their Ukrainian Advocates to the Defendants. PW-1 has tendered the office copy along with English translation of the said notice dated 27th June, 2012. PW-1 has deposed that the contents thereof are true and as per the instructions of the Plaintiff. The Notice as well as the translation are taken on record and marked Exhibit-P-9 collectively.

3.12. That the Defendants replied by way of their Ukrainian Advocates letter dated 13th August, 2012. The reply contains no response on the merits of the Plaintiff's claim. PW-1 has tendered the said reply along with English translation thereof. The reply letter along with the translation are taken on record and marked Exhibit-P-10 collectively.

3.13. That the Plaintiff is therefore entitled to receive from the Defendants an amount of 8,87,831.06 USD together with interest at the rate of 12% p.a. until payment and / or realization thereof.

4. I have perused and considered the facts set out in Plaintiff and the evidence of PW-1. I have also gone through and considered the documents which are marked Exhibits-P-1 to P-10 collectively.

5. From Exhibit-P-1, it is clear that the Board of Directors of the Plaintiff Company have by resolution passed in its meeting held on 13th July, 2015 authorized the Deponent to depose on behalf of the Plaintiff in the present Suit / proceedings. From Exhibit-P-2, it is clear that on 27th September, 2005 the Plaintiff entered into an Agreement with Defendant No. 1 whereby the Plaintiff appointed Defendant No. 1 as its Commission Agent in Ukraine to sell its various products more particularly enumerated in Annexure A to the said Agreement. The commission scale was defined in Annexure B to the said Agreement. The Agreement was to come into force on 27th September, 2005 and remain in force for a period of three years from this date. The Agreement spelt out the mutual rights and obligations of the respective parties.

6. From Exhibit-P-3, it is clear that on the same day i.e. 27th September, 2005 the Plaintiff and Defendant No. 1 also entered into a Confidentiality Agreement, whereby Defendant No. 1 agreed not to disclose any matter constituting the confidential information of the Plaintiff.

7. From Exhibit-P-4, it is clear that on 1st November, 2007 an amendment was made to Exhibit-P-2, whereby the commission structure payable to the Defendant No. 1 was revised. Again it can be seen from Exhibit-P-5 that the parties agreed to validate and renew the Agreement dated 27th September, 2005 (Exhibit-P-2) for a further period of one year and also agreed to make certain amendments thereto. Amended Clause 7 (h) now contemplated a remittance of entire collection and outstanding to the Principal i.e. Plaintiff herein upon closure or termination of the Agreement.

8. From Exhibit-P-6 collectively, it is established that the Plaintiff consigned the goods to the Defendants aggregating to a value of 1,42,29,028.69 USD and the Defendants remitted an amount of 1,33,41,197.63 USD on account, leaving outstanding an amount of 8,87,831.06 USD against the invoices set out in paragraph 2.8. hereinabove. Again from Exhibit-P-7, it is established that upon closure of the Agreement on 25th September, 2012, there was a debit outstanding of 8,87,831.06 USD in the Defendants ledger account maintained by the Plaintiff. The Defendants defaulted in remitting the balance outstanding aggregating to 8,87,831.06 USD is established from Exhibits-P-9 and P-10 respectively.

9. In the circumstances, I am satisfied that an amount of 8,87,831.06 USD is due and payable by the Defendants to the Plaintiff. In view thereof, the following order is passed :

- (i) The Defendants are ordered and decreed to pay an amount of 8,87,831.06 USD to the Plaintiff along with interest thereon at the rate of 6 % per annum from the date of filing of the Suit till payment and / or realization.
- (ii) The Defendants shall pay to the Plaintiff the cost of this Suit.
- (iii) Refund of Court Fees, if any as per Rules.
- (iv) The Suit is accordingly disposed of.

(S.J.KATHAWALLA, J.)